THE ESTABLISHMENT OF A GUESTHOUSE ON A RESIDENTIAL PROPERTY: COMPLYING WITH RESTRICTIVE CONDITIONS OF TITLE AND TOWN PLANNING SCHEME PROVISIONS

1 Introduction

Guesthouses and bed and breakfast establishments (B&Bs) have grown tremendously in popularity throughout South Africa. Most of them are situated in residential areas and are part of, or linked to, an existing dwelling on a property. They are normally operated by the home owner, who usually (but not always) resides on the property. Travellers are attracted by competitive rates, personal service and an informal atmosphere in homely surroundings away from the hustle and bustle of the inner city. The home owner, in turn, is attracted by the income generating potential of the venture and the relative ease with which the operation can be conducted on site from home. The quality and nature of the establishments vary from the very basic to ultra luxurious, some offering facilities and accommodation comparable to (perhaps even exceeding) the best offered by some top hotels. In fact many guesthouses come close to being boutique hotels, having extensive guest facilities and a variety of accommodation options, such as luxurious suites and self-catering apartments. Guesthouses and B&Bs also differ in size and get-up, many comprising no more than one or two of the existing bedrooms in a house. Others have five or more bedrooms specifically built and designed by an owner for the purposes of operating a guesthouse on his property. In the latter instance the bedrooms often do not adjoin the existing dwelling on the property, but constitute a free-standing building on the property. Another variation is where an entire house is converted into a guesthouse, with the owner residing in a flatlet on the property. Most guesthouses, like B&Bs, provide breakfast while many also cater for supper.

Given the increasing demand for guesthouse accommodation on the part of both tourists and business travellers, it is not surprising that many property owners are keenly contemplating embarking on a guesthouse venture. Obviously many aspects need to be considered, including the legal issues. This note focuses on the legal requirements from a property law perspective. This is not merely of academic interest. In the recent case of *Van Rensburg v Nelson Mandela Metropolitan Municipality* (unreported, case no 1668/06 SECLD) the High Court ordered a property owner in an upmarket residential suburb of Port Elizabeth to demolish a second storey to the garage on the property, as well as another free-standing building, both of which had been erected for the purposes of conducting a guesthouse business on the property. The demolition application was brought by a

neighbouring owner who complained, *inter alia*, that the extensions to the garage and the erection of the free-standing building were carried out contrary to certain restrictive conditions contained in the title deed of the property, namely that (i) the property may be used for residential purposes only; (ii) only one single house dwelling for use by a single dwelling family and ordinary outbuildings required for such use may be built on the property; and (iii) no garage other than for ordinary use for persons residing on the erf may be erected on the property.

Non-compliance with the relevant legal requirements can therefore have far-reaching consequences for the would-be guesthouse owner.

2 What is a guesthouse?

There appears to be no fixed description of what constitutes either a guesthouse or a B&B from a commercial point of view. The *Concise Oxford Dictionary* defines a guesthouse as a "superior boarding house". One website (wordnet.princeton.edu/perl/webwn) describes it as "a house separate from the main house; for housing guests" while another (www.your dictionary.com) defines it as:

> "1. A small house or cottage adjacent to a main house, used for lodging guests.
> 2. A bed-and-breakfast."

The Professional Association of Innkeepers International (an organisation of nearly 3 000 members) distinguishes between various categories of B&Bs, including Bed and Breakfast Inns; Country Inns; and Home-Stays, each having its own characteristics and differing subtly from one another (see http://www.paii.org/paii_faqs.asp). The Tourism Grading Council of South Africa (www.tourismgrading.co.za), however, draws no such distinction, and defines a *bed and breakfast* as an establishment where

> "accommodation is provided in a family (private) home and the owner/manager lives in the house or on the property. Breakfast must be served. Bathroom facilities may or may not be en-suite and/or private. In general, the guest shares the public areas with the host family".

It defines a *guesthouse* as an establishment which

> "can be an existing home, a renovated home or a building that has been specifically designed to provide overnight accommodation. A guest house must however have public areas for the exclusive use of its guests. A guest house is a commercial enterprise and as such the owner or manager may live on the property".

For the purposes of this note it is unnecessary to draw a distinction between a guesthouse on the one hand and a B&B on the other – the expression "guesthouse" is conveniently used to encompass both establishments. It is also unnecessary to establish exactly what constitutes a guesthouse from a commercial point of view. Suffice to state that it is an accommodation establishment on a residential property which forms part of or is linked to an existing dwelling on the property and which is used to

provide overnight facilities for guests, with or without breakfast. It is important, however, to stress that this is not necessarily the correct *legal definition* of a guesthouse. Given the absence of a universally accepted definition, municipalities regulating the erection or operation of guesthouses would normally have a specific definition for the purposes of the relevant town planning scheme. For example, in terms of the Port Elizabeth Municipality's town planning scheme a guesthouse is defined as:

> "[A] building which is used for human habitation, has not more than one kitchen and is occupied by the owner and in which persons are accommodated on a temporary basis".

It is useful to examine the definition more closely, if only to point out that it is fraught with difficulties. In terms of the definition it is irrelevant whether any meals are provided to guests, and whether guests share any lounge or breakfast facilities with the home owner. There is also no limit on the number of rooms that may be utilised for the purposes of a guesthouse. In theory, therefore, an owner can build a house on his property with say, 20 bedrooms, and utilise all of them for the purposes of a guesthouse. Any building would comply with the definition of "guest house" in the town planning scheme as long as

(a) the building is used for *human habitation*;

(b) the building has no more than *one kitchen*;

(c) the owner *occupies* the property; and

(d) other persons are accommodated on a *temporary basis*.

Requirement (a) needs no comment, except to state that it is seemingly not required that the property be used solely for human habitation; pets could also be accommodated provided their stay in the property is connected with human habitation. It would, however, fall outside the definition of a guesthouse if the property or part thereof is effectively used as a kennel. As far as (b) is concerned, the question arises: what is meant by "one kitchen"? Is a facility comprising a microwave oven, a mini fridge and a kettle a kitchen? Concerning (c) it is clear that the owner's occupation of the property need not be continuous, but what is less clear is whether the owner has to be in occupation in person, or whether he can do so through a representative such as a manager. It is also not clear whether the owner has to occupy the property as a resident, or whether it would suffice if he does so during the course of the day as part of running the guesthouse. In respect of (d) the question arises: when is accommodation on a *temporary basis*? Does a ten-year lease constitute accommodation on a temporary basis?

Knowing what constitutes a guesthouse for the purposes of a town planning scheme is important because the scheme may require the municipality's special consent for the operation of a guesthouse on a property zoned residential 1. This is discussed more fully below.

3 The legal issues from a property law perspective

Most residential property owners wishing to conduct a guesthouse on their properties would invariably have to

(a) convert or refurbish part of the existing dwelling for the purposes of the guesthouse;

(b) extend the existing dwelling by building on a number of bedrooms (and perhaps other facilities, such as lounge areas); and/or

(c) erect a separate building on the property to be used for the purposes of the guesthouse.

This is where the legal requirements from a property law perspective enter the picture. Essentially the requirements fall into three main categories, namely:

(i) approval of building plans;

(ii) adherence to restrictive conditions contained in the title deed of the property; and

(iii) compliance with the town planning scheme.

Each of these categories is discussed more fully below. It should be mentioned that additional requirements may apply where a property is situated in a group housing development, such as a sectional title scheme. In these developments the rules of the scheme may contain provisions restricting or prohibiting owners from using their properties for the purposes of a guesthouse operation. This is not discussed in this note. Suffice to state that in a sectional title scheme these rules must be reasonable and they must apply equally to all owners of units used for substantially the same purpose: section 35(3) of the Sectional Titles Act 95 of 1986. In respect of other developments it is a debatable question to what extent such rules are open to attack on constitutional grounds in view of section 25(1) of the Bill of Rights, which prohibits deprivation of property except in terms of law of general application.

3 1 Approval of building plans

If the owner's existing dwelling is to be extended or new buildings are to be erected, the owner would have to have the necessary building plans prepared and approved by the municipality. In this respect it is necessary to have regard to sections 5(1), 6(1) and 7(1) of the National Building Regulations and Building Standards Act 103 of 1977 which read as follows:

> "5(1) … [A] local authority shall appoint a person as building control officer in order to exercise and perform the powers, duties or activities granted or assigned by or under this Act.
>
> 6(1) A building control officer shall –

(a) make recommendations to the local authority in question, regarding any plans, specifications, documents and information submitted to such local authority in accordance with s 4(3) …

7(1) If a local authority, having considered a recommendation referred to in s 6(1)(a) –

(a) is satisfied that the application in question complies with the requirements of this Act and any other applicable law, it shall grant its approval in respect thereof;

(b) (i) is not so satisfied; or

(ii) is satisfied that the building to which the application in question relates –

(aa) is to be erected in such manner or will be of such nature or appearance that –

(aaa) the area in which it is to be erected will probably or in fact be disfigured thereby;

(bbb) it will probably or in fact be unsightly or objectionable;

(ccc) it will probably or in fact derogate from the value of adjoining or neighbouring properties;

(bb) will probably or in fact be dangerous to life or property

such local authority shall refuse to grant its approval in respect thereof and give written reasons for such refusal."

A prospective guesthouse owner should appreciate that his neighbours may not necessarily share his excitement about the new venture that he intends establishing on his property. He should therefore expect some opposition from the neigbouring owners, especially if the new structures would affect the view from adjoining properties or if the nature and size of the new structures are such that the adjoining dwellings would visually be dwarfed thereby. The National Building Regulations and Building Standards Act does not require a municipality to invite comments from adjoining property owners before approving a building plan, but nothing prohibits it from doing so either. This is where the first level of opposition may be encountered. But even if the adjoining owners have not been consulted, they will obviously become aware of developments on their neighbour's property once the building work commences. The moment that the true nature of the development becomes known, aggrieved neighbours may seek to have the municipality's approval of the building plan set aside on the grounds that the municipality had not appointed a building control officer as required by section 5(1) of the Act; that such officer (if appointed) had not made any recommendations regarding the building plan in question as required by section 6(1)(a); or that the municipality had not applied its mind to the matter properly having regard to the factors listed in section 7(1)(b)(ii)(aa)(aaa)-(ccc). The usual argument raised by aggrieved adjoining owners is that the new structures are unsightly and objectionable, and would probably or in fact derogate from the value of adjoining or neighbouring properties.

Property owners have thus far had limited success in relying on the provisions of the National Building Regulations and Building Standards Act

to have a municipality's decision to approve a building plan set aside. In *Paola v Jeeva NO* (2004 1 SA 396 (SCA)) the review application succeeded primarily because the municipality had not appointed a building control officer, but also because it was common cause that the development in question would obstruct the view from the adjoining property and would thereby in fact derogate from the value of that property. That judgment must, however, be seen in proper perspective; it is no authority for the proposition that obstructing a neighbour's view in all instances amounts to a derogation of the value of his property (see Delport "The Value of a Neighbour's View" 2004 *Obiter* 91).

Section 7(1) in express terms imposes an *obligation* on a municipality to refuse the approval of a building plan (i) if it is not satisfied that the application for approval of the plan complies with the requirements of the Act and any other applicable law, or (ii) once it is satisfied that one of the factors listed in subsections (b)(ii)(aa)(aaa)-(ccc) or subsections (b)(ii)(bb) is present. In these circumstances the municipality has no discretion to refuse the approval; it *must* do so. However, once a plan has been approved a property owner wishing to have the approval set aside based on section 7(1) would have to show that the municipality had not applied its mind to the matter properly in that it had (i) erred in being satisfied that the application for approval of the plan complied with the requirements of the Act and any other applicable law, or (ii) failed to properly evaluate facts and circumstances which would have satisfied it that one of the factors listed in subsections (b)(ii)(aa)(aaa)-(ccc) or subsections (b)(ii)(bb) is present. In practice this may be an extremely difficult onus to discharge, depending on the facts and circumstances. An owner aggrieved by a prospective guesthouse development on his neighbour's property may have more success in opposing the venture on one of the other grounds discussed below.

3 2 Adherence to restrictive conditions contained in the title deed of the property

Restrictive conditions of title in respect of residential properties are often imposed by the developer of a township relating to the improvements that may be effected on properties in the township and/or the use of the properties by the respective owners. The conditions may impose a variety of restrictions, including building line restrictions, a limit on the number of buildings that may be erected on a property, a prohibition on subdivision or on making use of certain types of building materials or construction methods, and a restraint on the use of a property for business purposes. The restrictions are imposed by the developer in order to establish and maintain the character of township and are usually registered against the title deeds of all the properties in the township (see generally *Swiss Hotels (Pty) Ltd v Pederson* 1966 1 SA 197 (C); and *Hayes v Minister of Finance and Development Planning, WC* 2003 4 SA 598 (C)). The conditions may be imposed in favour of a specific individual only, or in favour of *all* owners in the township. In the latter event the restrictive conditions constitute praedial

servitudes whereby each erf in the township is simultaneously both a servient tenement and a dominant tenement (*Camps Bay Ratepayers Association v Minister of Planning, Western Cape* 2001 4 SA 294 (C) 324J). The implications of this were set out as follows in *Malan v Ardconnel Investments (Pty) Ltd* (1988 2 SA 12 (A) 37U):

> "Where the registered restrictive title conditions are, however, praedial servitudes each erf becomes simultaneously both a servient tenement and a dominant tenement. It is a servient tenement encumbered by the restrictive title conditions in its own title deed in favour of all the other erven as dominant erven. But it is also a dominant tenement in respect of the restrictive title conditions inserted in the title deeds of all the other erven as servient tenements. Compare *Ex parte Johannesburg Diocesan Trustees* 1936 TPD 21 at 26, *Cannon v Picadilly Mansions (Pty) Ltd* 1934 WLD 187 at 191. This result flowed from the circumstance that it was an important element of the general scheme, relating to the sale of erven and the establishment of the township, to insert the restrictive title conditions in all the title deeds of erven in the township for their reciprocal benefit in order to preserve the essential character of the township."

Restrictive conditions of title in respect of properties in a township are often at odds with the local municipality's town planning scheme. For example, a town planning scheme may allow the erection of a second dwelling on a property or the establishment of a guesthouse (usually subject to the municipality's special consent – see below), but these activities may well be prohibited by the restrictive conditions registered against the title deed of the properties in the township. In this respect a prospective guesthouse owner faces a particular difficulty: he cannot simply ignore or by-pass the restrictive conditions of title as if they don't exist. It is not sufficient merely to get the municipality's consent for the establishment of the guesthouse or to have the relevant building plans approved as required by the town planning scheme. The law in this respect is quite clear:

(a) A municipality's zoning scheme does not override title deed conditions (*Camps Bay Ratepayers Association v Minister of Planning, Western Cape supra* 324).

(b) A consent by a local authority in terms of a town planning scheme does not *per se* authorise the use of an erf contrary to its registered restrictive title conditions (*Malan v Ardconnel Investments (Pty) Ltd supra* 40E).

A prospective guesthouse owner may therefore find that although the municipality has no objection to his plans to establish a guesthouse on his property, he is effectively prohibited from proceeding with his venture by reason of restrictive conditions contained in the title deed of his property. These conditions are enforceable by the owner or owners in the township in whose favour the conditions have been imposed. In the circumstances the only solution would be to have the relevant conditions removed from the title deed or to have them cancelled by agreement between all relevant parties. In practice, where the conditions are praedial servitudes imposed in favour of all the erven in a township it is rarely practical or possible to obtain the consent of each and every owner in the township in order to have the conditions cancelled by notarial deed; some owners are bound to refuse

their consent, whatever their motive. The only alternative is therefore to seek the removal of the conditions. This can be done by either

(a) obtaining a court order; or

(b) following the procedures laid down in provincial or national legislation empowering an administrative authority to remove or alter title deed conditions.

Each of these procedures is discussed briefly next.

Obtaining a court order directing the removal of restrictive conditions

A court has no statutory or common law power to remove a condition of title and can generally do so only if all owners affected by such an order consent (*Ex parte Saiga Properties (Pty) Ltd* 1997 4 SA 716 (E); and *Ex parte Optimal Property Solutions CC* 2003 2 SA 136 (C)). As was stated in the *Optimal* case:

> "[4] It is authoritatively established that the character of such conditions is that of reciprocal praedial servitudes. The resultant relationship between the owners of the affected erven in respect of the rights and obligations arising from such servitudes is contractual. The registration of the servitutal rights and obligations results in the creation of real rights in property. See *Provisional Trustees, D Alan Doggett Family Trust v Karakondis and Others 1992 (1) SA 33 (A) at 38D - E; Malan and Another v Ardconnel Investments (Pty) Ltd* 1988 (2) SA 12 (A); *Ex parte Florida Hills Townships Ltd* 1968 (3) SA 82 (A) and *Alexander v Johns* 1912 AD 431 at 443.
>
> [5] It necessarily follows that any alteration to or removal of such title deed conditions alters or terminates the contractual rights and obligations of the affected property owners inter se and alters or expunges, as the case might be, real rights in property.
>
> [6] It is not the function of the Courts unilaterally and without the consent of all the affected parties to make or break contracts. An obvious incidence of this trite principle is that the Courts have eschewed assuming the power at common law to alter or remove title deed conditions of the nature currently in issue without the consent of every affected property owner. Accordingly, the objection or refusal to consent by a single affected property owner is fatal to an application at common law for the alteration or removal of such a title deed condition. The objector does not have to motivate his objection or demonstrate that it is not unreasonable. See *Ex parte Rovian Trust (Pty) Ltd 1983* (3) SA 209 (D) and the *Florida Hills Townships* case supra at 93F - G and 97 in fine - 98."

An application to court for the removal of title deed conditions is usually an *ex parte* application for a rule nisi calling on affected parties to show cause why the removal of the condition should not be confirmed by the court on the return date. Objectors must object within the stated period, and failure to do so has the result that consent for the removal is inferred (*Ex parte Florida Hills Townships Ltd* 1968 3 SA 82 (A)). However, this would apply only if there has been adequate service on all interested parties, such as delivery of a copy of the application to them by registered mail. A mere notice of the application in local newspapers is not sufficient. As was stated in the *Optimal* case:

> "[19] In my view, the issue assumes an added dimension in the context of s 25(1) of the Constitution of the Republic of South Africa Act 108 of 1996. It is there provided that '(n)o one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property'. Property rights are among the fundamental rights enshrined in chap 2 of the Constitution. A purposive construction of 'property' means that it should be read to include any right to, or in property. There is no valid basis to read down the provisions to obtain a more limited meaning of the word. Registered praedial servitutal rights are therefore included within the concept of 'property' under s 25(1). Accordingly any removal or deletion of such rights is pro tanto a deprivation of property.
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> [20] The provisions of s 25(1) of the Constitution do not affect the power of the Court to accede to an application to remove a relevant title deed restriction with the consent of all affected parties. They do, however, reflect the importance of property rights and they provide limitations which constrain any removal of, or interference with them. In affording relief in matters such as the instant application, it is essential, if the right enshrined in s 25 is to be adequately respected, that the principle of 'inferred consent', which has historically been the rationale for granting relief where there is no objection pursuant to a rule nisi, be applied on the basis of the Court being satisfied on a balance of probability that the service in terms of the rule has achieved effective notice to the affected parties. There is no warrant to accord preference to an applicant who wishes to obtain the cancellation of a servitude, but finds it inconvenient (rather than impossible, or at least reasonably impracticable) to give personal notice to each of the right holders, over the property owners whose rights are liable to be affected."

The practical result of the aforementioned legal principles is that obtaining a court order for the removal of title deed conditions is often not a viable proposition. Many of the affected owners will probably not object, but some will. Their objection, even unreasonable, would be a fatal blow to the application and the prospective guesthouse owner would still not be able to proceed with his venture.

Legislation empowering an administrative authority to remove or alter title deed conditions

There are a number of statutes empowering certain authorities to remove restrictive conditions of title, including provincial legislation in some of the provinces (see Van Wyk "Townships and Town Planning" (28) *LAWSA* 312). Generally, however, in the absence of provincial legislation, applications for removal are brought in terms of the Removal of Restrictions Act 84 of 1967 (hereinafter "the Act"). In terms of the Act (s 2(1)(aaa)-(ccc)) restrictive conditions of title or servitudes registered against the title deed of a property may be removed where such conditions or servitudes relate to

(a) the subdivision of the land; or

(b) the purpose for which the land may be used; or

(c) the requirements to be complied with or to be observed in connection with the erection of buildings or the use of land.

In terms of section 2(1)(a) of the Act such restrictive conditions or servitudes may be removed, conditionally or unconditionally, "whenever the Administrator of a province in which the land in question is situate, is

satisfied that it is desirable to do so in the interest of the establishment or development of any township or in the interest of any area, whether it is situate in an urban area or not, or in the public interest … ".

The "Administrator" for the purposes of the Act is the "competent authority" in a province to whom the administration of the Act has been assigned under section 235(8) of the Constitution.

Section 3 of the Act lays down the procedure to be followed in an application for the removal of a restriction or servitude. The applicant must submit the application in the form prescribed by the Administrator, and the application must be accompanied by such documents and particulars as the Administrator may require (s 3(1)). The application must be lodged with the local authority, and a copy of the application must be forwarded by the applicant to the Director-General of the province. The local authority is required to transmit the application to the Director-General with its comments and recommendations thereon (s 3(2)).

Section 3(6) provides for notice to be given to the public. It reads as follows:

> "(6) On receipt of an application the Director-General shall cause a notice in both official languages to be published once in the Provincial Gazette of the province and twice with an interval of one week in a newspaper circulating in the area in which the land is situate, stating that such an application has been made, that it is open to inspection at the office of the Director-General and at any other place or places, if any, mentioned in the notice, and that objections against the application may be lodged with the Director-General on or before a specified date which shall not be less than twenty-one days after the date of the last publication of the notice, and the Director-General shall also cause, where possible, a copy of the notice to be served on every owner of land who in his opinion is directly affected by the application, such service to be effected by registered post addressed to such owner at his last known address."

The purpose of section 3(6) is to "apprise interested persons of an application and to afford them an opportunity to ascertain to what extent their rights may be affected and to enable them to protect their rights by appropriate objections to the proposals of the applicant" (*Beck v Premier, Western Cape* 1998 3 SA 487 (C) 510G). To achieve this objective it is not sufficient to merely notify interested parties that an application for removal of title deed conditions has been made. Interested parties can only express a view on the merits of an application if they are given information about the nature of the proposed development of the property, should the restrictive conditions of title be removed. Any notice given in terms of section 3(6) must therefore contain details of such proposed use. The position in this regard was stated clearly in *Beck v Premier, Western Cape* (*supra* 510D):

> "Section 3(6) of the Act requires in peremptory language that notice be given that an application has been made for removal of a restrictive condition in title deeds of property, that the application is open for inspection and that objections to the application may be lodged. It is not necessary in this case to embark upon a discussion whether the requirement of notice in the statute is mandatory or merely directory, or to seek to infer from the provisions of the Act whether disregard of this requirement does or does not result in nullity of or irregularity in the administrative procedure for removing title deed

conditions. As already remarked, the power conferred on the Minister is a discretionary one. It requires that not only applicants but objectors must be heard. It is apparent that the rights or interests of other property owners, or even residents in the area, may be adversely affected by such an application. These considerations make proper notice to interested persons essential for the proper exercise of the power.

The purpose of the required notice is to apprise interested persons of an application and to afford them an opportunity to ascertain to what extent their rights may be affected and to enable them to protect their rights by appropriate objections to the proposals of the applicant.

It was submitted that the notice required by the Act entails no more than information that an application had been made, that it was open for inspection and might be objected to and that nothing further had to be conveyed to the general public than that. It was submitted that no notice need be given of the nature of the proposed development of the property. If there was such a proposed development it need not be mentioned in the notice.

This submission is, in our opinion, untenable for two reasons. Firstly, the Act prescribes that the application shall be submitted in the form prescribed by the Minister and the prescribed form used in this case required that the applicant should state the purpose for which the property will be used if the application is successful and the reasons for the application. An application which fails to state its purpose or the reasons for making it, would not comply with the Act and be open to objection on that ground. A fortiori an application or notice thereof which misstates the proposed use of the property or the reasons for the application to the extent that interested persons are misled thereby as to the manner or extent of possible interference with their rights might vitiate the application.

Secondly, since the exercise of the power to remove title deed conditions or servitudes may affect the rights of others, they would by law be entitled to proper notice of the application even if the Act was silent on the matter. The Act cannot be understood to restrict the notice which the common law requires for administrative action of the kind authorised by the Act. Notice which is misleading in regard to the purpose or reasons for the application would be improper notice, depending of course on the circumstances of each particular case. *Roberts v Chairman, Local Road Transportation Board and Another* (1) 1980 (2) SA 472 (C) at 479B--H. And C compare the cases of *Vale of Glamorgan Borough Council v Palmer and Bowles* 1981 LGR 678; *Canterbury City Council v Bern* 1981 JPL 749 and Foulkes on *Administrative Law* 8th ed at 273 and following, where these decisions are discussed …

[512] Applications for removal of title deed conditions cannot be assessed in a vacuum without regard to the consequences for persons owning property in the area should the condition be removed. Such proposals clearly do impact on and qualify the application. Reference thereto in the notices of the application should be such as may be relied upon by members of the public who may be affected by the application, particularly since the development proposal and plan serves to inform the authorities and the public to what extent and in what manner the removal of the conditions may be expected to affect the neighbourhood and the persons living there.

If the description of the proposed development in the notice or in representations made by submitting plans to the authorities, as was done in this case, may have the result of misinforming or misleading persons with an interest in the application, so that, for example, they do not object to the proposed development, that may, in the circumstances of a particular case, lead to the conclusion that proper notice has not been given. The opportunity to object may thereby be circumvented. Interested persons may not be afforded a proper opportunity to be heard in objection to the application ultimately considered and granted by the Minister."

It is furthermore important to note that in terms of section 3(6) the Director-General is obliged not only to publish a notice in the Provincial

Gazette and in a local newspaper stating that an application has been made, but also, where possible, to serve a copy of such notice "on every owner of land who in his opinion is directly affected by the application". Such service is to be effected by registered post addressed to such owner at his last known address. The subsection obliges the Director-General to effect the service of the notice on the owners concerned, once he has formed the requisite opinion. The opinion required is a conclusion reached after due deliberation and due application of the mind (*Hayes v Minister of Finance and Development Planning, WC supra* 632C). Where restrictive conditions of title constitute reciprocal praedial servitudal rights, *all* the registered owners of properties that benefit from, or are subject to, the servitude are "directly affected" by the application (*Hayes v Minister of Finance and Development Planning, WC supra* 632G). Accordingly, unless circumstances are such that it would be impossible to do so, copies of the notice referred to in section 3(6) must be served on *all such owners*; it would be insufficient to serve a copy on the applicant's immediate neighbouring owners only (*Hayes v Minister of Finance and Development Planning, WC supra*; *Camps Bay Ratepayers Association v Minister of Planning, Western Cape supra* 318G; and *Ex parte Optimal Property Solutions CC supra* 145C-J).

When considering an application for removal of conditions of title the relevant "competent authority" must be mindful of the following legal principles governing such applications:

1. Section 2(1)(a) permits the removal of a restrictive condition of title or a servitude only if it is *desirable* to do so

   (a) in the interest of the establishment or development of any township; or

   (b) in the interest of any area, whether it is situate in an urban area or not; or

   (c) in the public interest.

   It is clear that the interests which must be served by the removal of restrictive conditions are the broader interests of the township or the area, or the public interest. The personal interest of an applicant seeking the removal of title deed conditions is therefore irrelevant. Moreover, the mere fact that the removal of restrictive conditions may not be *undesirable* does not mean that the removal is in fact *desirable* (*Camps Bay Ratepayers Association v Minister of Planning, Western Cape supra* 321C).

2. In terms of section 25(1) of the Constitution no one "may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property". Registered praedial servitudes are included within the concept of "property" under section 25(1); accordingly, any removal or deletion thereof would constitute a deprivation of property (*Ex parte Optimal Property Solutions supra* 144A). The Removal of Restrictions Act is a "law of general application" as contemplated in section 25(1) of the Constitution (*Ex parte Optimal Property Solutions supra* par 21) and the framework created by the Act

for the removal of title deed conditions is such that it can safely be said that the Act does not permit arbitrary deprivation of property. In other words, should a title deed condition be removed following a proper application of the provisions of the Act, such removal would not constitute "arbitrary" deprivation of property. What this means, however, is that when the relevant "competent authority" considers an application for removal of title deed restrictions it should be mindful of the fact that the Act does not permit it to arbitrarily deprive a property owner of his servitudal rights. Property rights are among the fundamental rights enshrined in the Constitution and the provisions of section 25(1) "reflect the importance of property rights and … provide limitations which constrain any removal of, or interference with them" (*Ex parte Optimal Property Solutions CC supra*). The tenor of section 25(1) is that deprivation of property rights should not be resorted to lightly. In the context of section 2(1)(a) of the Removal of Restrictions Act this means that the relevant competent authority should not grant an application whereby a person other than the applicant would be deprived of his property rights, unless the grounds on which the application is based clearly justify an opinion that it is desirable to do so in the interests of the township or the area, or the public interest.

3. Restrictive conditions of title are not simply a relic of the past. As was stated in *Camps Bay Ratepayers Association v Minister of Planning, Western Cape* (*supra* 324):

> "Indeed, a theme running through the arguments put up by the developer in support of the removal application is that restrictive conditions are a relic of the past and should be abolished in favour of the zoning scheme … However, this is not the philosophy of the Act and it was inappropriate and irregular for the Minister to have allowed himself to be swayed by this consideration. In my view the Minister's approach in this regard is fundamentally unsound."

4. The mere fact that restrictive conditions of title are "at odds" with the zoning scheme does not establish that the removal thereof would be in the interest of the township or the area or the public interest (*Camps Bay Ratepayers Association v Minister of Planning, Western Cape supra* 324). As was stated in the latter judgment (324F):

> "The Minister also relies on the fact that the proposed development would be in conformity with the property's zoning under the zoning scheme and that the restrictions are 'at odds' with the zoning scheme. Once again, this does not establish that the removal of the restrictive conditions would be in the interest of the township, area or public. The zoning scheme does not override title deed restrictions (*Malan and Another v Ardconnel Investments (Pty) Ltd* 1988 (2) SA 12 (A) at 40E - F) and indeed the zoning scheme expressly confirms this point. If it were in the public interest for all properties to be subject only to zoning restrictions, the Legislature would simply have abolished all restrictive title deed conditions by statute. Instead, it has laid down a procedure whereby such title deed restrictions can be removed only if to do so would specifically be in the interest of the township, area or public."

5. The fact that there is already a partially erected structure on a property in conflict with a restrictive condition of title is not a valid consideration justifying the removal of the condition, since it has nothing to do with the interests of the township, area or the public interest; it has everything to do with the developer's predicament (*Camps Bay Ratepayers Association v Minister of Planning, Western Cape supra* 325J).

Against this background a prospective guesthouse owner may not find it an easy task to persuade the relevant competent authority that it is desirable that the title deed conditions prohibiting him from proceeding with his venture should be removed, having regard to the interests of the township, the interest of the area or the public interest. Objectors may find it far easier to argue that the removal would serve the interests of the applicant only, nobody else.

3 3 Compliance with the town planning scheme

The purposes for which properties may be used are regulated in terms of municipal town planning schemes. In terms of these schemes every property covered by the scheme is zoned for a particular use, such as residential, business, commercial and industrial. Certain uses are defined as a primary right, meaning that the owner may use the property for the defined purpose without obtaining the municipality's consent; other uses are permitted only with the special consent of the municipality. A town planning scheme may for example stipulate that a property zoned "residential 1" may be used for the purposes of a dwelling house as a primary right, but that a guesthouse may be established on the property only if the municipality's special consent has been obtained.

Generally, town planning schemes do not specify the factors to be taken into account by the municipality for the purposes of considering an application by an owner for such special consent. They usually merely specify the procedure to be followed by an owner when applying for such special consent. It is submitted that any application for special consent should be considered against the backdrop of the general purpose of a zoning scheme, which is usually defined in the relevant provincial legislation as the co-ordinated and harmonious development of the area to which it relates, in such a way as will most effectively promote health, safety, order, amenity, convenience and general welfare in the area (see *BEF (Pty) Ltd v Cape Town Municipality* 1983 2 SA 387 (C); *Bedfordview Town Council and Strydom v Mansyn Seven (Pty) Ltd* 1989 4 SA 599 (W); and Van Wyk J (28) *LAWSA* par 181). The essence of a town planning scheme is that it is conceived in the interests of the community to which it applies, not the general public interest (*Pick 'n Pay Stores Ltd v Teazers Comedy and Revue CC* 2000 3 SA 645 (W)). Accordingly, an application for special consent to establish a guesthouse should be refused if the operation of the guesthouse would impact negatively on health, safety, order, amenity, convenience and general welfare in the area in question. It must also be kept in mind that one of the purposes of laying down use zones for a township is the creation and retention of the specific character of an area (*Pick 'n Pay Stores Ltd v*

Teazers Comedy and Revue CC supra; and *Van Rensburg v Nelson Mandela Metropolitan Municipality supra*). When evaluating the impact of a proposed guesthouse establishment on the character of an area, a crucial factor to consider should obviously be the scale on which the owner intends operating the guesthouse. It is one thing to allow an owner to utilise one single bedroom for the purposes of a guesthouse; it is quite another to permit an owner to utilise 30 double bedrooms for that purpose. What must be kept in mind is that the property is zoned residential 1; it is not zoned "business". It is submitted, therefore, that when a proposed guesthouse establishment would be operated on a scale effectively amounting to an extensive business operation on a residential property in a residential area, special consent should be refused. Another factor to consider should be the impact on traffic in the area should the consent be granted. In areas where traffic congestion is already a problem special consent to establish a guesthouse should not readily be granted, particularly in cases where a relatively large number of people could be accommodated in the proposed guesthouse.

As explained earlier (par 3 2) consent by a local authority in terms of a town planning scheme does not *per se* authorise the use of an erf contrary to its registered restrictive title conditions. In fact, the municipality's consent may be quite worthless to an owner by virtue of restrictions which exist in the title deed (*Enslin v Vereeniging Town Council* 1976 3 SA 443 (T) 447C). Before the owner can take advantage of the municipality's consent he must remove any legal impediment which may exist in order to enable him to put the property to the use for which the municipality has consented for town planning purposes (*Enslin v Vereeniging Town Council supra*). An application for special consent may be made to, and be granted by, a municipality before the removal of title deed restrictions (*Enslin v Vereeniging Town Council supra* 447D). It is submitted, however, that from a policy point of view a municipality should in principle not grant special consent for the establishment of a guesthouse where such use is prohibited in terms of restrictive conditions of title. This should be specifically so in cases where the zoning scheme expressly recognises the fact that the zoning scheme does not override registered conditions of title. It would be a waste of public resources to even consider an application for special consent where a restrictive condition of title would effectively prohibit the implementation of a successful application.

4 Conclusion

Owners of residential properties in suburban areas have to overcome a number of hurdles before they will be entitled to establish a guesthouse on their properties. In most cases the municipality's special consent will have to be obtained, but that in itself may not be sufficient. In many instances the establishment of a guesthouse may be prohibited by restrictive conditions contained in the title deed of the property, in which event the municipality's consent will mean nothing until the restrictions are cancelled by agreement with all affected property owners, or are removed in terms of a court order or

by an administrative authority which is statutorily empowered to do so. A court will not order the removal of title deed conditions unless all affected owners consent. Administrative authorities do not have a free hand to remove restrictive conditions of title but may do so only to the extent that the relevant legislation permits the removal. A well-motivated application would be required, but even then the objectors may succeed in persuading the relevant authority not to find in the applicant's favour. A would-be guesthouse owner takes a huge risk by not following the correct procedures, and may in the end be faced with a court order directing the demolition of structures on the property that was intended to be used for the purposes of the guesthouse venture.

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